Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Trustees for the Michigan Carpenters Council Pension Fund, Trustees for the Michigan Carpenters Council Health and Walfare Fund, Trustees for the Michigan Carpenters Council Apprenticeship and Training Fund,

Petitioners,

v.

W.W.A., Inc., a Michigan corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the statutory liquidated damage provisions of 29 U.S.C. Sec. 1132(g)(2) apply in an ERISA enforcement action where contributions are due at the time the action is filed but are paid before a judgment for the contributions is entered.

PARTIES TO THE PROCEEDINGS

Petitioners

Trustees for the Michigan Carpenters Council Pension Fund, Trustees for the Michigan Carpenters Council Health and Welfare Fund, Trustees for the Michigan Carpenters Council Apprenticeship and Training Fund. Petitioners are individuals, and have no corporate affiliations.

Respondent

W.W.A., Inc. a Michigan Corporation.

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OPINIONS BELOW

The District Court's Findings are set forth at Appendix B at p. 9a. The Sixth Circuit's Opinion is set forth at Appendix A at p. 1a. The Order Denying Rehearing is set forth at Appendix D at p. 36a.

BASIS FOR JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was entered on March 23, 2000. Plaintiff's Petition for Rehearing and Suggestion for Rehearing *en banc* was denied on June 1, 2000. This Petition for Writ of Certiorari is filed within ninety (90) days from that date. 28 U.S.C. §2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §1001(b):

> It is hereby declared to be the policy of this Act to protect the interests of participants in employee benefit plans and their beneficiaries by establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. §1132(g)(2):

> In any action under this subsection by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan –
>
> (a) the unpaid contributions;
> (b) interest on the unpaid contributions;
> (c) an amount equal to the greater of –
> (i) interest on the unpaid contributions, or
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the Court under subparagraph (a);
> (d) reasonable attorney's fees and costs of the action, to be paid by the defendant; and
> (e) such other legal or equitable relief as the court deems appropriate.

29 U.S.C. §1145:

> Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collective bargaining agreement shall, to the extent not inconsistent with law, make such

contributions in accordance with the terms and conditions of such plan or such agreement.

STATEMENT OF THE CASE

The Plaintiffs are Trustees for multi-employer benefit plans (sometimes "Funds") established pursuant to provisions of the Labor Management Relations Act of 1947 ("LMRA") and the Employee Retirement Income Security Act of 1974 ("ERISA") 29 U.S.C. §1001, *et seq.* (1976), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), [29 U.S.C. §§1132(g)(2) and 1145 (as amended) (1982)]. The plans provide pension, health care, apprenticeship and training benefits to plan participants and beneficiaries.

Defendant is a Michigan corporation which was formed in 1990 and which engages primarily in the construction and repair of highway bridges. Since 1994, Defendant has been a party to a series of collective bargaining agreements between Defendant's designated negotiating agent, the Michigan Road Builders Association ("MRBA"), and the Michigan Regional Council of Carpenters ("MRCC"). These contracts form the basis for Defendant's obligation to remit fringe benefit contributions to the Funds, and contain specific fringe benefit contribution schedules.

The trial court made detailed findings of fact in this matter which have not been challenged. These findings provide the basis for the facts presented to this Court. (App. B at 9a) Plaintiffs filed the present action on July 14, 1998. (App. B at 12a) The action was based upon both §§1132 and 1145 of Title 29. At the time, Defendant owed contributions for the work months of March, April and May of 1998.

(App. B at 12a) Defendant was served with Plaintiffs' Summons and Complaint on August 3, 1998. Defendant paid its March, April and May contributions on August 17, 1998. (App. B at 12a) By this time Defendant's June contributions were delinquent. Defendant paid its June and July contributions on August 28, 1998. (App. B at 12a)

Trial occurred on November 20, 1998. On December 30, 1998, the Court issued its Findings of Fact and Conclusions of Law. The Court denied Plaintiffs' request for statutory liquidated damages and granted other relief which is not relevant to this Petition. (App. B at 21a-22a)

On March 23, 2000, the Sixth Circuit Court of Appeals issued an Opinion which affirmed in part and reversed in part the District Court's Judgment. The Court of Appeals affirmed that portion of the trial court's ruling which denied statutory liquidated damages. (App. A at 8a)

On March 30, 2000, Plaintiffs filed a Petition for Rehearing and Suggestion for Rehearing *en banc* limited solely to the issue which is presented to this Court (App. C at 24a). The Petition was denied on June 1, 2000. (App. D at 36a)

REASONS FOR GRANTING THE WRIT

THE SIXTH CIRCUIT'S POSITION HOLDING THAT STATUTORY LIQUIDATED DAMAGES ARE NOT RECOVERABLE IN AN ERISA ENFORCEMENT ACTION IF DELINQUENT CONTRIBUTIONS ARE PAID BEFORE A JUDGMENT ENTERS FOR SUCH AMOUNTS IS CONTRARY TO THE LEGISLATIVE INTENT OF THE MULTI EMPLOYER PENSION PLAN AMENDMENT ACT AND IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE FIVE (5) OTHER CIRCUIT COURTS WHICH HAVE CONSIDERED THE QUESTION.

1. Introduction: The Issue and the Ruling Below

29 U.S.C.§1145 codifies an employer's contractual obligation to remit fringe benefit contributions. 29 U.S.C. §1132(g)(2) provides that liquidated damages are mandatory when plan fiduciaries obtain a judgment in an action based upon 29 U.S.C. §1145.

This Petition presents the following legal question:

> Whether the statutory liquidated damage provisions of 29 U.S.C. §1132(g)(2) apply in an ERISA enforcement action where contributions are due at the time the action is filed but are paid before a judgment for the contributions is entered by the Court.

The Sixth Circuit Court of Appeals decided the issue in *Michigan Carpenters Council Health and Welfare Fund v. C.J. Rogers, Inc., et al.*, 933 F. 2d 376 (6th Cir. 1991), *cert denied*, 112 S. Ct. 585 (1991), by holding that statutory

liquidated damages are available only if contributions remain due at the time a Judgment enters. The Court stated:

> The language of Section 1132(g) is mandatory, and once the provision applies, the district court must award liquidated damages. *See, e.g., Idaho Plumbers & Pipefitters v. United Mechanical Contractors, Inc.*, 875 F.2d 212, 215 (9th Cir. 1989); *Central States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1156 (7th Cir. 1989); *Amalgamated Ins. Fund v. Sheldon Hall Clothing*, 862 F.2d 1020, 1023 (3d Cir. 1988), *cert. denied*, 490 U.S. 1082, 109 S.Ct. 2104, 104 L.Ed.2d 665 (1989); *Penn Elastic Co. v. United Retail & Wholesale Corp.* , 792 F.2d 45, 47 (3d Cir. 1986). The section provides that upon 'a judgment in favor of the plan' the court shall award the plan 'the unpaid contributions' and 'interest on the unpaid contributions.' 29 U.S.C. § 1132(g)(2)(A) & (B). Thus it is clear that the provisions of that section apply only if there were unpaid contributions on the date of the award. In reaching this conclusion we reject the decisions of those courts which state, often in dicta, that the provisions of section 1132(g)(2) apply at the time suit is filed. *See, Idaho Plumbers & Pipefitters*, 875 F.2d at 215; *Carpenters & Joiners Welfare Fund v. Gittleman Corp.*, 857 F.2d 476, 478 (8th Cir.1988); *Carpenters Health and Welfare Fund of Philadelphia and Vicinity v. Building Tech. Inc.*,747 F.Supp. 288 (E.D.Pa. 1990); *Bennett v. Machine Metals Co.*, 591 F.Supp.

> 600, 605-06 (E.D.Pa. 1984); *Trustees of the Glaziers Local 963 Pension, Welfare and Apprentice Funds v. Walker and Laberge Co., Inc.*, 619 F. Supp. 1402, 1405 (D.C.Md. 1985).

933 F.2d at 388-389.

In the present case, the trial court specifically found that Defendant owed contributions to the Plaintiffs when this enforcement action was filed, stating:

> On the date Plaintiffs filed this suit, July 14, 1998, W.W.A. was delinquent in its contributions for March, April and May 1998.

(App. B at 12a) The Court went on to find that the delinquent contributions were paid before trial and, as a result, the Court rejected Plaintiffs' claim for statutory liquidated damages based upon the authority of *C. J. Rogers, supra*. (App. B at 21a-22a) The Court recognized that:

> The *C. J. Rogers* holding with respect to §1132(g)(2) damages has been sharply criticized and rejected by several circuit and district courts.

(App. B at 21a) The Court however recognized that it "must follow *C. J. Rogers*." (App. B at 22a)

2. The Conflict Among the Circuits

The Sixth Circuit's decision is in conflict with the decisions of the five (5) other Circuits which have considered the issue. The Second, Fifth, Seventh, Eighth and Ninth

Circuits have disagreed with the relevant portion of the decision in *C.J. Rogers*. For example, in *Iron Workers District Council of W. New York & Vicinity Welfare and Pension Funds v. Hudson Steel Fabricators & Erectors, Inc.*, 68 F. 3d 1502 (2nd Cir. 1995), the Court stated, in part,

> "[p]ermitting delinquent employers to avoid paying §1132 penalties after suit is filed, . . . would largely thwart the purpose of §1132(g)(2) to provide plan fiduciaries with an effective weapon against delinquent employers."

See also: Northwest Administrators, Inc. v. Albertson's Inc., 104 F. 3d 253, 257 (9th Cir. 1996); *Parkhurst v. Armstrong Steel*, 901 F. 2d 796 (9th Cir. 1990); *Idaho Plumbers and Pipefitters v. United Mechanical*, 875 F. 2d 212, 215 (9th Cir. 1989); *Carpenters and Joiners Welfare Fund v. Gittleman Corporation*, 857 F. 2d 476, 478 (8th Cir. 1988); *Carpenters, etc., Health Benefit Fund v. Ryan Construction*, 767 F. 2d 1170, 1173-74 (5th Cir. 1985). *Giles v. Burton Construction Company*, 736 F. 2d 1142, 1146, n. 6 (7th Cir. 1984).

Each District Court deciding the issue has also disagreed with this aspect of the decision in *C.J. Rogers*. *See Carpenters Health and Welfare Fund of Philadelphia and Vicinity v. Building Tech., Inc.*, 747 F. Supp. 288 (E.D. Pa 1990); *Jefferson Tile Co. v. Colorado Tile, Marble & Terrazzo Workers Health, Welfare and Pension Funds*, 797 F. Supp 857, 859-60 (N. Colo. 1992); *Chicago District Council of Carpenters Pension Fund, et al. v. Sciortimo Contractors, Inc.*, 934 F. Supp 277 (N.D. Ill. 1996); *Farrell v. Metropolitan Relocations, Inc.*, 1996 WL 19223 (E.D.N.Y. 1-11-96, No. CV-95-0557); *Bennett v. Machine Metals Co.*, Inc., 591 F. Supp. 600, 604 (E.D. Pa 1984); *Chicago District Council of Carpenters Pension Fund, et al., v. The Industrial*

Erectors, Inc., 840 F. Supp. 1248 (N.D. Ill. 1993); *Roofers Local Union No. 81, et al., v. Wedge Roofing, Inc.*, 811 F. Supp 1398, 1401 (N.D. Cal. 1992); *Board of Trustees v. Udovch*, 771 F. Supp 1044, 1047 (N.D. Cal. 1991); *Teamsters Local No. 429 Health and Welfare Fund v. Chain Bike Corp.*, 643 F. Supp 1337, 1343-44 (E.D. Pa. 1986); *ITPE-MEBA/NMU Funds v. United International Investigative Services*, 13 EBC 2538 (D.C. 1991) (mem. order).

Petitioners contend that the significant conflict makes certiorari appropriate. In addition, the issue of statutory interpretation which is presented in this cause is the type of "important matter" identified in Supreme Court Rule 10(a) because the issue relates to the financial stability of ERISA based employee benefit plans. Benefit plans must be able to recover the costs which they incur in causing employers to remit delinquent contributions. If the plans are not allowed to recover these amounts solely because delinquent contributions are paid, they will be required to expend plan assets in order to enforce the statutory and contractual obligation to remit contributions. It is clear that Congress, in adopting the MPPAA, intended that plans should always be able to recover such amounts from delinquent employers.

For these reasons, Petitioners submit that *certiorari* should be granted to resolve the conflict among the Circuits relating to this issue.

3. The Reasons why the Decisions Which Conflict with the Sixth Circuit's Position are Correct.

In adopting the Multi-Employer Pension Plan Amendment Act of 1980 ("MPPAA") Congress intended to simplify collection actions and to provide employee benefit

plans with a mechanism to recover all of their costs in the collecting of delinquent contributions. In many cases, such as this one, delinquent contributions are paid solely because a lawsuit is filed.

The basis for adoption of the MPPAA is clear. From its inception, ERISA was designed to be a comprehensive statute that would protect the rights of persons participating in employee benefit plans.[1] However, after the statute was implemented, it became clear that multi-employer funds were experiencing great difficulty in collecting accrued contributions. As a result, in 1980, Congress modified certain portions of ERISA with legislation identified as the Multi-Employer Pension Plan Amendments Act of 1980, Pub. L. 96-364. The MPPAA was intended to address the financial problems facing trustees because of delinquent contributions and unpaid withdrawal liability. *Penn Central Corporation v. Western Conference of Teamsters Pension Trust Fund*, 75 F. 3d 529, 531 (9th Cir. 1996).

The MPPAA was passed after consideration of detailed committee reports. The Senate Report provided, in part:

> "Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans. Failure of employers to make promised contributions in

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[1] 29 U.S.C. §1001(b) provides: "It is hereby declared to be the policy of this Act to protect the interests of participants in employee benefit plans and their beneficiaries by establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts."

a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been . . . received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys fees and other legal costs arise in connection with collection efforts."

"These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates . . ."

"Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law (other than 29 U.S.C. §186). Sound national pension policy demands that employers who enter into

agreements providing for pension contributions not be permitted to repudiate their pension promises."

"The public policy of this legislation to foster the preservation of the private multiemployer plan system necessitates that provision be made to discourage delinquencies and simplify delinquency collection. The bill imposes a Federal statutory duty to contribute on employers that are already obligated to make contributions to multiemployer plans. A plan sponsor that prevails in any action to collect delinquent contributions will be entitled to recover the delinquent contributions, court costs, attorney's fees, interest in connection with delinquencies. The intent of this section is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies."

STAFF OF SENATE COMM. ON LABOR AND HUMAN RESOURCES. 96TH CONG. 2D SESS. S. 1076, SUMMARY AND ANALYSIS OF CONSIDERATION 43-44 (Comm Print 1980). (*See also* H.R. Rep. No. 869, 96th Cong., 2d Sess. 67, in 1980 U.S. Code Cong. & Ad. News 2918, 2935) The managers of this legislation in the House and Senate read into the Congressional Record portions of this report. (Cited and discussed in *Central States v. Gerber Truck*, 870 F. 2d. 1148, 1152-53 (7th Cir. 1989) (*en banc*), and *Central States, Southeast and Southwest Pension Fund v. Alco Express Co.*, 522 F. Supp 919 (E.D. Mich 1981).)

The intent of Congress is clear. First, Congress codified the contribution obligation by enacting §1145. More important, Congress strengthened §1132 in a variety of ways, including by making an award of liquidated damages mandatory.

The purpose of the MPPAA was to allow plans to collect delinquent contributions as simply and inexpensively as possible. Congress intended that plans should be allowed to collect all of their costs where they are successful. A plan which collects delinquent contributions after filing a complaint for such amounts has been successful. If the statutory purpose of the MPPAA is to facilitate collections and eliminate the cost of collection to multi-employer plans, the plans must be allowed to collect §1132(g)(2) damages from employers such as Defendant for plans to incur the cost of initiating and filing a lawsuit, and who pay contributions only after a collection action is filed. If benefit plans are not allowed to collect these amounts, the purpose of the MPPAA will be thwarted.

CONCLUSION

For these reasons, Petitioners request this Court to issue a writ of certiorari in this matter for the purpose of reviewing the decision of the United States Court of Appeals for the Sixth Circuit. Petitioners further request the Court to reverse that portion of the decision which holds that Petitioners are not entitled to recover statutory liquidated damages in this matter because Defendant paid delinquent contributions before a Judgment entered against the Defendant for such amounts.

Respectfully submitted

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APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed March 23, 2000]

No. 99-1144

TRUSTEES FOR MICHIGAN CARPENTERS COUNCIL PENSION FUND; TRUSTEES FOR MICHIGAN CARPENTERS COUNCIL APPRENTICESHIP AND TRAINING FUND; TRUSTEES FOR MICHIGAN CARPENTERS COUNCIL HEALTH AND WELFARE FUND, *Plaintiffs-Appellants*,	)
v.	)
W.W.A., INC., *Defendant-Appellee.*	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

OPINION

BEFORE: WELLFORD, BATCHELDER, and DAUGHTREY, Circuit Judges.

HARRY W. WELLFORD, Circuit Judge. Plaintiff Trustees for the Carpenters Pension Fund, Health and Welfare Fund, and Apprenticeship and Training Fund ("Trustees"), and the Michigan Chapter Associated General Contractors of America and the Michigan Regional Council of Carpenters and All Affiliated Locals, filed suit against W.W.A., Inc.("WWA"), a Michigan corporation, on July 14, 1998. Trustees alleged that WWA was delinquent on its pensions and contributions to the Health and Welfare Fund and the Pension Fund for March, April, and May of 1998. Trustees, on August 12, filed an emergency motion seeking a preliminary injunction for future timely payments and reports. Plaintiffs also assert that WWA paid its March, April, and May contributions not until August 17, 1998, and its June and July contributions not until August 28, 1998. After a bench trial on the issue of injunctive relief, the district court issued its judgment and findings of fact and conclusions in which it granted plaintiffs partial injunctive relief in that it ordered WWA to file its trust fund contribution reports with the Trustees and to pay its monthly *health care* benefit contributions on or before the fifteenth day of the month following the month in which covered work is performed.

The district court, however, denied plaintiffs' requested injunctive relief with respect to pension benefits upon finding that WWA was current in its monthly employee benefit contributions as of August 28, 1998, and that Trustees demonstrated no irreparable harm in that respect. The district

court stated that "although W.W.A. does have a history of making delinquent contributions, the evidence does show that all payments have been made," and under *Michigan Carpenters Council Health and Welfare Fund v. C.J. Rogers, Inc.*, 933 F.2d 376 (6th Cir. 1991), the district court denied plaintiffs' request for damages under 29 U.S.C. § 1132(g)(2). In the course of these conclusions, the district court found credible the testimony of WWA president Wilbur W. Argersinger that WWA made August contributions without notice or knowledge of the filing of this suit. The district court additionally noted that plaintiffs had been less than entirely successful in collecting the claimed late payment assessments, because the court awarded them less than the amount sought and also denied attorney's fees. Judgment for Trustees directed WWA to pay plaintiffs $2,708.18 net for unpaid late payment assessments. Plaintiffs duly filed notice of appeal.

Plaintiffs are Trustees for multi-employer benefit plans established pursuant to the Labor Management Relations Act of 1947 and the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*, as amended by the Multiemployer Pensions Plan Amendments Act of 1980. The Trustees provide health care, retirement, and other benefits to plan participants and beneficiaries, and the Trustees are third-party beneficiaries of certain collective bargaining agreements to which WWA is a party. The third-party administrator is TIC International Corporation, whose payroll audit manager, Michael J. Gauthier, acts as the liaison between TIC and the Trustees, who serve on plaintiffs' joint delinquency committee. Gauthier testified at some length at trial.

WWA, a Michigan corporation, is a bridge rehabilitation contractor. Since 1984, WWA has been a party to collective bargaining agreements between its agent, the Michigan Road Builders Association, and the Michigan Regional Council of Carpenters. The relevant contracts provide, in part:

> Each contractor agrees to make contributions to the Michigan Carpenters Council Health Care Fund, the Michigan Carpenters Council Pension Fund, and the Michigan Carpenters Council Apprenticeship and Training Fund on all hours worked by each employee doing work covered by this agreement within the time and in the manner prescribed by the Trustees of said Funds and to abide by the *rules and regulations promulgated by the Trustees* serving thereunder.

(Emphasis added.) The contract refers generally to Trustees' rules and regulations, which WWA attests were "frequently amended and rarely communicated to WWA." WWA asserts that the "amendments entail hundreds of pages going back to 1965," and WWA president, Argersinger, testified he never saw the Trustees' late fee policies or Employer Handbook until after this suit was flied. The Employer Handbook provides:

> **WHEN ARE CONTRIBUTIONS DUE?**
> Contributions must be received by the depository bank by the 15th day of the month following the month in which the work was performed. If contributions are not received

> by the depository bank by that date, you will be subject to late payment assessments as described below. Late payments may also adversely affect your employees' eligibility under the Health Care Fund.
>
> **WHAT HAPPENS WHEN PAYMENTS ARE LATE?**
> If your contributions are not received by the depository bank when they are due, liquidated damages in the form of Late Payments Assessments will be assessed. The schedule of late payments assessments is determined by the Board of Trustees. . . .

Gauthier testified that TIC calculates late payments assessments a month (not the fifteenth day) following the month in which payments are alleged due. If the benefit and late fees are paid before then, no further action is taken against the contractor. Gauthier testified that he was not aware of anything in the policies or handbook stating that a delinquency in payment of contributions is a breach of the collective bargaining agreement.

Along with monthly contributions, contractors are to supply information identifying the number of hours each employee performed covered work during that month. The specified form states, in part, that "[b]y filing this form, the Employer agrees that it is obligated both to remit fringe benefit contributions as required by the current collective bargaining agreement and to abide by all terms of the Trust Agreements as well as all rules, regulations & policies adopted by the Funds." Trustees asserted and established that

WWA was regularly late in making its reports and payments. With respect to attorney's fees and costs, the Employer Handbook provides:

> Federal law allows the Funds to recover all costs incurred by the Funds, including but not limited to, attorney fees and the costs associated with the preparation of an audit, in collecting delinquent Fringe Benefit Contributions, Audit Assessments, Late Payment Assessments and/or Interest.

Gauthier also testified that the September audit report showed a slight overpayment of fringe benefits. After Argersinger informed Gauthier by letter that an annuity payment had not been credited in his audit, Gauthier corrected the audit and issued a revised audit report reflecting a $651.56 credit or overpayment of fringe benefit contributions through July of 1998. Late fees in the revised audit report were $3,359, the amount the Trustees claimed in this case, but applying the overpayment credit, the balance came to $2,708.19. Gauthier testified that employers customarily were given a fifteen day grace period before charging late pay assessments. WWA office manager, Paula Rock, testified that she never received a call in which someone told her she was past due because she had missed the 10th or 15th of the month, and Argersinger stated that typically WWA did not receive calls unless the work month was at least thirty days late.

Rock testified that a computer crash was a contributing factor to WWA's delinquency in making reports and payments. Argersinger testified also about financial problems and slow pay in respect to collecting on the state highway

projects. The district court found that the computer breakdown contributed to the delinquencies in the time period in question.

The Trustees argue that ERISA gives authority to grant injunctive relief and does not require a showing of irreparable harm. In the alternative, the Trustees contend that the district court erred in requiring it to show whether its financial condition was affected by WWA's late payments. The district court found that "Plaintiffs have not shown that W.W.A.'s late contributions have affected the financial condition of the Pension Fund or that beneficiaries of the Fund are not receiving payments." The Trustees argue that when prompt contributions are not made, they are harmed by the additional required administrative costs.

The district court found that plaintiffs did demonstrate harm when health benefit reports were late and payments were late, in that individual employees may be put at risk in such circumstances. The district court made detailed findings and conclusions in this cause, concluding:

1. WWA was enjoined to file benefits contribution reports and to pay health care contributions to the Trustees and file reports by the fifteenth day of the month following the month of covered work activity hereafter.

2. Trustees were awarded late payment assessments from WWA in the net amount of $2708.19 (without prejudice

to collection of subsequent late pension contributions, if any).

3. Injunctive relief on late pension payments was denied.

4. Attorney's fees were denied.

For the reasons stated by the district court based on its findings, we **AFFIRM** the district court with respect to its conclusions and orders No. 1 through No. 3 above. We do not necessarily hold that in such cases plaintiffs seeking equitable and extraordinary relief must always demonstrate irreparable harm but, under the circumstances here, we find no abuse of discretion in the holding of the district court.

We **REVERSE**, however, holding No. 4, denial of attorney's fees. The agreement of the parties clearly prescribes reasonable attorney's fees where, as in this case, plaintiffs' counsel is successful in obtaining relief. Plaintiffs' counsel obtained some informative and some monetary relief We, therefore, **REMAND** to the district court for determination of a reasonable attorney's fee.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed December 30, 1998]

No. 4:98-CV-100

TRUSTEES FOR THE MICHIGAN CARPENTERS COUNCIL PENSION FUND, TRUSTEES FOR THE MICHIGAN CARPENTERS COUNCIL HEALTH AND WELFARE FUND, TRUSTEES FOR THE MICHIGAN CARPENTERS COUNCIL APPRENTICESHIP AND TRAINING FUND, THE MICHIGAN CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, THE MICHIGAN REGIONAL COUNCIL OF CARPENTERS AND ALL AFFILIATED LOCALS,

Plaintiffs,

v.

W.W.A., INC., a Michigan corporation,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 to 1461, brought by the Trustees of certain ERISA multi-employer benefit plans and others for the collection of delinquent pension and fringe benefit contributions. Plaintiffs initially sought an injunction requiring Defendant, W.W.A., Inc. ("W.W.A.), to pay delinquent contributions and allow Plaintiffs to conduct an audit of W.W.A.'s books and records as required by the parties' collective bargaining agreement. Subsequent to the filing of the complaint, W.W.A. paid all delinquent contributions and permitted Plaintiffs to audit its books and records. On November 20, 1998, the Court conducted a bench trial on the remaining issues in the case, namely, Plaintiffs' request for a permanent injunction requiring W.W.A. to pay contributions within the time set forth in the collective bargaining agreement and their claim for collection of late payment assessments and damages pursuant to 29 U.S.C. § 1132(g). The Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a are set forth below.

Findings of Fact[1]

Plaintiffs are trustees of multi-employer employee benefit plans (the "Funds") which provide pension, medical, vacation, and other benefits to employees of participating employers. W.W.A. is engaged primarily in the business of

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[1] Any finding of fact that is a conclusion of law shall be considered as such.

building and repairing highway bridges throughout Michigan, although the majority of its work occurs on the eastern side of the state. For several years, W.W.A. has been a party to collective bargaining agreements between W.W.A.'s representative, the Michigan Road Builders' Association ("MRBA"), and the Michigan Regional Council of Carpenters ("MRCC"). W.W.A. is presently a party to the 1998 collective bargaining agreement ("CBA") between MRBA and MRCC.

Pursuant to the CBA, W.W.A. is required to remit monthly contributions to the Funds based upon the rates set forth in the CBA. The CBA provides that employers such as W.W.A. are required to make all contributions "within the time and in the manner prescribed by the Trustees of [the] Funds. . . ." (1995-1998 CBA Art. IV, Pls.' Ex. 1; 1998-2003 CBA Art. IV, Pls.' Ex. 2.) The payment rules adopted by the Trustees require that all contributions must be "received by the depository bank by the 15th day of the month following the month in which the work was performed." (Employer Handbook at 3, Def.'s Ex. M.) The Trustees impose a late payment assessment on all delinquent contributions equal to "5% of the amount paid if payment is late one month, or less . . . an additional 5%, for a total of 10% of the amount paid, if payment is more than one month late, but less than two months late . . . [and] an additional 1.5% of the amount paid, per month, for each month beginning with the third month. . . ." (Collection Practices & Policies of 5/24/94 at 2, Def.'s Ex. G.) However, at trial, Mike Gauthier ("Gauthier"), who is employed as an auditor by TIC International ("TIC"), the third-party administrator of the Funds, testified that late payment fees are not assessed

until the first day of the month following the month in which payments are due, thus creating a fifteen-day grace period.

On the date Plaintiffs filed this suit, July 14, 1998, W.W.A. was delinquent in its contributions for March, April, and May 1998. W.W.A. paid its March, April, and May contributions on August 17, 1998. On August 28, 1998, W.W.A. paid its contributions for June and July 1998. Thus, at the time of trial, W.W.A. was current on its monthly employee benefit contributions.

Wilbur Argersinger, the president of W.W.A., testified that the longer payment delay for the months of March through May occurred as a result of a computer breakdown in March 1998, which left W.W.A. in the situation of having to perform all of its payroll functions by hand until it was able to get its new computer system up and running in August. On cross-examination, Plaintiffs' counsel sought to demonstrate that the computer breakdown did not significantly impact W.W.A.'s ability to complete and file its fringe benefit reports and pay its contributions in a timely manner. Based upon its assessment of Mr. Argersinger's testimony and the testimony of Paula Rock, W.W.A.'s office manager, the Court finds that the computer breakdown contributed to the delay, but was not the primary cause of the delay. In other words, it is likely that W.W.A. would still not have made the payments on time, although they might have been made earlier. This finding is based upon evidence produced by Plaintiffs which established that W.W.A. has consistently been delinquent in making payments by anywhere from weeks to several months at a time. (See Payment History, Pls.' Ex. 10). It is also based upon Mr. Argersinger's testimony about W.W.A.'s cash flow needs, as

W.W.A. does not collect for extras from the State of Michigan until the completion of the project. In addition, even accounting for the fifteen-day grace period, W.W.A. would have made timely payments for only nine out of its forty-seven most recent contributions.[2] (See id.)

In September 1998, TIC conducted an audit of W.W.A.'s books and payroll records. TIC initially determined that for the period of October 1997 through July 1998, W.W.A. owed late payment assessments in the amount of $3,359.74. However, upon further review conducted at W.W.A.'s request, TIC determined that W.W.A. was entitled to a credit of $651.02 for a previously paid annuity assessment, leaving a total of $2,708.18, exclusive of interest, owed by W.W.A. to Plaintiffs.

W.W.A. attempted to show that Plaintiffs maintain a policy of waiving late payment assessments if the employer did not know or understand the payment rules. The evidence failed to demonstrate that Plaintiffs have waived late payment assessments under similar circumstances or that Plaintiffs agreed to waive the late payment assessments at issue. The evidence did show that while employers have a right to

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[2] Argersinger testified that he believed that the payment was made the day it was mailed by W.W.A. Argersinger could cite no provision of the CBA or other written document from the Trustees to support such a result. Given the explicit language of the provisions governing the time for payment, the Court finds no support for Argersinger's understanding of when a payment is deemed received. A payment is received when it is received by Plaintiff.

request a waiver, they have no right to receive a waiver as the decision to grant a waiver is left solely to Plaintiffs.

Gauthier testified that pension funds are adversely affected by delinquent employer contributions because delinquency notices must be sent to employers, the monthly statements sent to participants may be inaccurate, the funds lose the use of money for investment income, and actuarial calculations may be impacted because participants are credited for service regardless of whether contributions are actually paid by employers. He admitted, though, that the pension funds have not become financially unstable due to W.W.A.'s or any other employer's delinquent contributions.

Gauthier testified that the health care funds are essentially affected in the same manner by delinquent contributions with the exception that participants do not receive credits when an employer is late in making contributions. Consequently, employees may be required to pay their own health care premiums when employers fail to make timely payments. Gauthier could not say with any certainty whether any of W.W.A.'s employee's health care coverage had been adversely affected by W.W.A.'s delinquent contributions.

Conclusions of Law[3]

I. Injunctive Relief

Plaintiffs are multiemployer pension and welfare benefit plans subject to ERISA. See 29 U.S.C. §§ 1002(3), (37). In enacting ERISA, Congress gave the courts authority to issue injunctive relief to enforce the goals and policies, and prevent violations, of ERISA. See Laborers Fringe Benefit Funds-Detroit & Vicinity v. Northwest Concrete & Constr., Inc., 640 F.2d 1350, 1352 (6th Cir. 1981) (per curiam). Specifically, § 502(a)(3) of ERISA provides that a fiduciary may bring a civil action

> (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

29 U.S.C. § 1132(a)(3).

In enforcing ERISA's provisions, courts have not hesitated to issue injunctive relief when the facts demonstrate that the plan will be irreparably harmed in the absence of such relief or that it has no adequate remedy at law available to collect delinquent contributions. For example, in Zorn v. K.C. Community Construction Co., 812 F. Supp. 948 (W.D.

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[3] Any conclusion of law that is a finding of fact shall be considered as such.

Mo. 1992), the court granted the plaintiffs a preliminary injunction compelling the employer to pay all delinquent contributions owed to the plaintiffs. The court also granted the plaintiffs prospective relief which required the employer to "[r]emain current with regard to all future fringe benefit contributions." Id. at 954. Because delinquent contributions had not been paid, the court focused its discussion on the preliminary injunction factors and found that the following facts established irreparable harm: (1) the defendant admitted it was delinquent and conceded that it could not pay the delinquency; (2) there was a possibility that employees could lose health care benefits; (3) one of the funds was in an extremely precarious financial condition; (4) the pension funds might have been forced to pay benefits to employees for whom no contributions had ben made; and (5) employees had lost their vacation and holiday benefits. See id. at 952.

Similarly, in Van Drivers Union Local No. 392 v. Neal Moving & Storage, 551 F. Supp. 429 (N.D. Ohio 1982) (mem. op.), the court granted the plaintiffs a preliminary injunction compelling the defendant to pay all delinquent contributions and permanent injunctive relief and "directing defendant to make its required contributions to the [plaintiffs] . . . as they [became] due." Id. at 433. In considering the propriety of injunctive relief, the court noted that over the course of the three preceding years the plaintiffs had to file two lawsuits to force the employer to pay delinquent contributions but the employer continued to be delinquent in its payments even after the settlements in those cases. See id. at 432. The court also found that as a result of the employer's delinquent contributions, the plan was unable to pay health insurance premiums. See id. at 431.

In Northwest Concrete, supra, the Sixth Circuit held that the district court erred in denying permanent injunctive relief to the plaintiff trust funds. See 640 F.2d at 1353. The court found such relief appropriate because: (1) the employer had continually shown contempt for the judicial process; (2) the employer was delinquent on its contributions; (3) it was "very likely" that the employer would continue to withhold contributions; (4) the prospects of collection of a money judgment against the employer were not good; (5) it was very likely that the employer's continued violations would injure the trust funds because the principal owner of the employer also owned other construction companies in the area that contributed to the funds. See id.

Injunctive relief was also issued in Teamsters Local 639-Employers Trust v. Jones & Artis Construction Co., 640 F. Supp. 223 (D.D.C. 1986) (mem. op.), which involved facts that were analogous to those in this case. In Teamsters Local 639, the plaintiffs filed suit to collect delinquent contributions on May 19, 1986. See id. at 224. The employer paid the delinquent contributions following an initial status conference on June 30, 1986. In addressing the request for injunctive relief, the court observed that

> [the] sequence of events, together with a fair reading of the defendant's answer, supports a reasonable inference that defendant and its counsel were resorting to dilatory tactics. The answer, as written, strongly suggests that [the defendant] had no substantive defense to the basic allegations of the complaint - that they had not filed the required reports and had not paid the required contributions.

Id. As further evidence of the employer's dilatory conduct, the court noted that the plaintiff had previously filed a similar lawsuit seeking to recover delinquent contributions from the defendant and that the case was "'settled and dismissed'" on the day the calendar call was held. See id. at 25. The court found that under those circumstances, prospective injunctive relief was warranted. See id.

Courts have also denied injunctive relief, even where the employer has been delinquent in the past, where the late payments have not threatened the financial stability of the trust fund, the employer acknowledges its payment obligations, and there was no demonstrated inability to collect a damage award from the employer. Thus, in Trustees of the Washington Area Carpenters' Pension & Retirement Fund v. Mergentime Corp., 743 F. Supp. 422 (D. Md. 1990), the court declined to issue injunctive relief because it found that irreparable harm would not result if the relief was not granted. The court based its conclusion on the facts that the defendants admitted their obligations to continue to pay contributions to the trust funds and would face liquidated damages for their failure to pay contributions in a timely manner. See id. at 428. Similarly, the court denied the plaintiff's request for injunctive relief in United Steelworkers of America v. Crane Co., 456 F. Supp. 385 (W.D. Pa. 1978) (mem. op.), reasoning that "[r]elief such as this should be restricted to cases where the plaintiff has a strong likelihood of prevailing on the merits and where nonpayment will cause irreparable harm." Id. at 389 (emphasis added) (observing that the employees were receiving pension fund payments and that it was not "a situation where no funds at all are going to the parties"); see also Central States, Southeast & Southwest Areas Pension Fund v. Sloan, 714 F. Supp. 943, 948 (N.D.

Ill. 1989) (mem. op.) (finding that monetary loss alone would not support injunctive relief without showing of irreparable harm to pension funds).

With the exception of the health care funds, which the Court will discuss separately below, the Court finds that injunctive relief is inappropriate in this case because Plaintiffs have failed to show irreparable harm. The facts in this case are more like those in Mergentime Corp. rather than Zorn or Northwest Concrete. Although W.W.A. does have a history of making delinquent contributions, the evidence does show that all payments have been made, and at the time of trial, W.W.A. was current in its contributions. Thus, this is not a case where W.W.A. has "steadily mounting delinquencies [that] undermine the requisite stability of the" fund. Van Drivers, 551 F. Supp. at 432. Plaintiffs have not shown that W.W.A.'s late contributions have affected the financial condition of the pension fund or that beneficiaries of the fund are not receiving payments. Because Plaintiffs have shown no more than the temporary loss of use of funds, which can be remedied through the collection of late payment assessments,

the Court will not enter injunctive relief with respect to pension fund contributions.[4]

The Court will, however, order W.W.A. to file fringe benefit contribution report forms within the time set by the Trustees pursuant to the CBA. As previously noted, the time for filing such reports is the fifteenth day of the month following the month in which the covered work is performed, not, as W.W.A. contends, the last day of such month.

The Court does find that injunctive relief is warranted with respect to contributions to the health care fund. In contrast to the pension fund, Plaintiffs have shown a real probability of harm to employees when W.W.A. fails to pay its health benefit contributions on time. Unlike the pension fund, employees are not given credit for health care coverage when an employer fails to make a timely contribution. Thus, an employee with insufficient credit is forced to choose between no coverage or paying his health care expenses out of his own pocket. Because no employee who has rendered service for his employer should be left in such a position, the Court finds that injunctive relief is warranted. Therefore, the

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[4] Plaintiffs contend that W.W.A. paid its delinquent contributions only after being notified that the instant lawsuit had been filed. While Plaintiffs did present evidence to support this conclusion, Argersinger testified that W.W.A. was unaware of the lawsuit when it made the delinquent payments. The Court found Argersinger's testimony credible. However, it should be noted that such testimony is only credible once; that is, if Plaintiffs are required to file additional lawsuits to collect future contribution, a "no notice" claim will be significantly less credible.

Court will also order W.W.A. to pay all health care contributions by the fifteenth day of each month. This means that payments must be *received* by the depository bank by that date.

II. Late Payment Assessment

W.W.A. is indebted to Plaintiffs in the amount of $2,708.18, which takes into account the $651.02 credit in favor of W.W.A. W.W.A. is not entitled to a waiver of the assessment, as it has failed to show any legal entitlement to a waiver.

III. Damages Under § 1132(g)(2)

Plaintiffs have also requested an award of interest, attorney fees, liquidated damages, and other amounts recoverable under § 1132(g)(2). Both the Court and the parties are fully aware of the Sixth Circuit's holding in Trustees for Michigan Carpenters Council Health & Welfare Fund v. C.J. Rogers, Inc. (In re Michigan Carpenters Council Health & Welfare Fund), 933 F.2d 376 (6th Cir. 1991), in which the court interpreted the phrase "in which a judgment in favor of the plan is awarded" in § 1132(g)(2) to mean that the provisions of that section apply only if there were unpaid contributions as of the date of the award. See id. at 388. Under the holding in C. J. Rogers, Plaintiffs are not entitled to recover any amounts under § 1132(g)(2) because there were no unpaid contributions as of the date of the judgment. The C.J. Rogers holding with respect to § 1132(g)(2) damages has been sharply criticized and rejected by several circuit and district courts. See, e.g., Iron Workers Dist. Council of W. New York & Vicinity Welfare & Pension Funds v. Hudson

Steel Fabricators & Erectors, Inc., 68 F.3d 1502, 1508 (2d Cir. 1995) (reasoning that "[p]ermitting delinquent employers to avoid paying § 1132 penalties after suit is filed, and particularly waiting until two days prior to the argument of the plaintiffs' motion for summary judgment, as here, would largely thwart the purpose of § 1132(g)(2) to provide plan fiduciaries with an effective weapon against delinquent employers"); Jefferson Tile Co. v. Colorado Tile, Marble & Terrazzo Workers Health, Welfare & Pension Funds, 797 F. Supp. 857, 859-60 (D. Colo. 1992) (rejecting minority rule in C. J. Rogers and finding that Tenth Circuit would adopt majority rule). However, this Court must follow C.J. Rogers.

IV. Attorney Fees

Plaintiffs also request an award of attorney fees pursuant to the provisions in their written policies and procedures. The Court finds that Plaintiffs are not entitled to an award of attorney fees under the facts of this case. As noted above, there was some question about whether W.W.A. paid its delinquent contributions in response to this suit, as Plaintiffs claim. The Court believed Mr. Argersinger's testimony on this point and finds that W.W.A. paid the fees without notice or knowledge that the suit had been filed. In addition, Plaintiffs were not entirely successful in their efforts to collect the late payment assessment they were awarded less than the amount that they were seeking. Therefore, fees will not be awarded.

Conclusion

For the foregoing reasons, the Court will grant in part and deny in part Plaintiff's request for injunctive relief. The Court will order W.W.A. to file its benefit contribution reports and pay its health care contributions on a timely basis, by the fifteenth day of the month following the month in which covered work is performed. The Court will deny Plaintiffs' request for injunctive relief with respect to W.W.A.'s other employee benefit contributions. The Court will award Plaintiffs the amount of $2,708.19 in late payment assessments. This Order will not be construed to prejudice any subsequent claim by Plaintiffs against W.W.A. regarding late payments of the pension contribution.

A Judgment consistent with this Opinion will be entered.

Dated: DEC 30 1998

/s/_____
GORDON QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Dated April 5, 2000]

No. 99-1144

TRUSTEES FOR MICHIGAN CARPENTERS COUNCIL PENSION FUND; TRUSTEES FOR MICHIGAN CARPENTERS COUNCIL APPRENTICESHIP AND TRAINING FUND; TRUSTEES FOR MICHIGAN CARPENTERS COUNCIL HEALTH AND WELFARE FUND, *Plaintiffs-Appellants*,	)
v.	)
W.W.A., INC., *Defendant-Appellee.*	)

On Appeal From The United States District Court
For The Western District Of Michigan

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Plaintiff requests this Court to grant rehearing in this matter and further suggests rehearing *en banc* pursuant to Federal Rule of Appellate Procedure F.R.A.P. 35(b)(1)(D) and Sixth Circuit Rule (6 Cir. R.) 35.

STATEMENT PURSUANT TO F.R.A.P. 35(b)

This Petition is limited to the following legal question:

> Whether an ERISA based employee benefit plan is entitled to collect statutory liquidated damages [based upon section 502(g)(2) of ERISA] where contributions to the plan are due at the time an enforcement action is flied, but are paid before a judgment for the contributions is entered.

The District Court, following this Court's prior published decision in Michigan Carpenters Council Health and Welfare Fund v. C.J. Rogers, Inc., et al., 933 F. 2d 376 (6th Cir. 1991), *cert denied,* 112 S. Ct. 585 (1991), found that such amounts could not be recovered because contributions were paid while the case was pending. The panel decision from this Court affirmed this portion of the District Court's ruling. However, this portion of the decision in C. J. Rogers is contradicted by every other published opinion from both Courts of Appeal and District Courts. These Courts have unanimously held that Section 502's statutory liquidated damages are available to a benefit plan if contributions are due to the plan when an action is filed seeking a judgment for

those contributions. Plaintiffs contend that this proceeding presents a question of exceptional importance as defined by Rule 35 because the panel decision (applying C.J. Rogers) conflicts with the authoritative decisions of the Courts of Appeal for the Second, Fifth, Seventh, Eighth and Ninth Circuits. For this reason, consideration by the Court *en banc* is necessary to appropriately address the question of whether C.J. Rogers was correctly decided.

En banc consideration is especially appropriate here because the panel which decided the case was not allowed to overrule the prior panel decision in C. J. Rogers. (See United States v. Layne, 193 F. 3d 556, 574 (6th Cir. 1999), citing Timmer v. Michigan Department of Commerce, 104 F. 3d 833, 839 (6th Cir. 1997), and Brentwood Academy v. Tennessee Secondary School Athletic Association, et al., 180 F. 3d 758, 765 (6th Cir. 1999).

ARGUMENT

RECONSIDERATION OF A PORTION OF THE COURT'S DECISION IN MICHIGAN CARPENTERS' COUNCIL HEALTH AND WELFARE FUND v. C. J. ROGERS, 933 F. 2D 376 (6th CIR. 1991), IS APPROPRIATE SO THAT THE COURT CAN CONSIDER THE REASONING APPLIED BY COURTS WHICH UNANIMOUSLY DISAGREE WITH A SPECIFIC PORTION OF THE C. J. ROGERS OPINION.

A. INTRODUCTION

The primary intent of the Multi-Employer Pension Plan Amendment Act of 1980 ("MPPAA") was to simplify

collection actions and to provide employee benefit plans with a mechanism to recover all of their costs in pursuing certain contested issues, including the collection of delinquent contributions and other amounts. In many cases, such as this one, delinquent contributions are paid solely because a lawsuit is filed.

Section 502 (29 U.S.C. §1132) of ERISA provides, in part, that, in an action brought pursuant to Section 515, Section 515 of ERISA (29 U.S.C. §1145) codifies the contribution obligation, "in which a judgment in favor of the plan is awarded, the court shall award the plan . . ." certain specified amounts to be paid by the Defendants including unpaid contributions, interest on the contributions, duplicate interest or liquidated damages established by the plan, reasonable attorney fees and costs of the action.

This Court, standing alone, has held that this statutory liquidated damage provision applies apply only if contributions remain unpaid at the time an award for contributions is entered by the Court. Michigan Carpenters' Council Health and Welfare Fund v. C.J. Rogers, Inc., et al., 933 F. 2d 376, 388 (6th Cir. 1991) *cert denied*, 112 S. Ct. 585 (1991). Five (5) other Circuit Courts disagree.

Plaintiffs request this Court to reconsider this aspect of the C. J. Rogers decision and hold, as have all other Courts considering the issue, that statutory liquidated damages are appropriate pursuant to Section 502 of ERISA in situations in which contributions are due in violation of Section 515 at the time an action is filed seeking to collect such amounts.

B. THE LEGISLATIVE INTENT SUPPORTING THE MPPAA WILL BE EFFECTIVE ONLY IF EMPLOYEE BENEFIT PLANS ARE ALLOWED TO RECOVER STATUTORY LIQUIDATED DAMAGES FOR CONTRIBUTIONS PAID AFTER AN ACTION IS STARTED TO ENFORCE 29 U.S.C. § 1145.

In C. J. Rogers, this Court held that the provisions of §1132(g)(2) apply only if there are unpaid contributions when the Court actually grants an award for such contributions. This Court rejected the argument that the amounts described in §1132(g)(2) are recoverable so long as there are unpaid contributions at the time the suit was filed seeking to collect contributions. The Court specifically stated:

> "(§1132(g)(2)) provides that upon 'a judgment in favor of the plan' the Court shall award the plan 'the unpaid contributions' and 'interest on the unpaid contributions.'" (Citations omitted) Thus it is clear that the provisions of that section apply only if there were unpaid contributions on the date of the award. C. J. Rogers 933 F. 2d. At 388.

Plaintiffs contend that the statutory language requires a different result. 29 U.S.C. § 1145 codifies the contribution obligation. § 1132 is the enforcement provision for § 1145 violations. There is no statutory requirement in the relief provisions contained within § 1132 that contributions remain due at the time of the Court's award. Rather, contributions must be due only when the enforcement action is filed. Regardless of whether the outstanding contributions are paid,

the benefit plan bringing the action is entitled to recover liquidated damages.

This is the position taken by the Second, Fifth, Seventh, Eighth and Ninth Circuits when each has disagreed with the relevant portion of C.J. Rogers. For example, in Iron Workers District Council of W. New York & Vicinity Welfare and Pension Fund v. Hudson Steel Fabricators & Erectors, Inc., 68 F. 3d 1502 (2nd Cir. 1995), the Court stated, in part,

> "[p]ermitting delinquent employers to avoid paying §1132 penalties after suit is filed, . . . would largely thwart the purpose of § 1132(g)(2) to provide plan fiduciaries with an effective weapon against delinquent employers."

See also: Northwest Administrators, Inc. v. Albertson's Inc., 104 F. 3d 253, 257 (9th Cir. 1996); Parkhurst v. Armstrong Steel, 901 F. 2d 796 (9th Cir. 1990); Idaho Plumbers and Pipefitters v. United Mechanical., 875 F. 2d 212, 215 (9th Cir. 1989); Carpenters and Joiners v. Gittleman Corporation, 857 F. 2d 476, 478 (8th Cir. 1988); Carpenters, etc., Health Benefit Fund v. Ryan Construction, 767 F. 2d 1170, 1173-74 (5th Cir. 1985). Giles v. Burton Construction Company, 736 F. 2d 1142, 1146, n. 6 (7th Cir. 1984).

A number of District Courts have also disagreed with this aspect of the decision in C.J. Rogers. See Carpenters Health and Welfare Fund of Philadelphia and Vicinity v. Building Tech., Inc., 747 F. Supp. 288 (E.D. Pa 1990); Jefferson Tile Co. v. Colorado Tile, Marble & Terrazzo

Workers Health, Welfare and Pension Funds, 797 F. Supp 857, 859-60 (N. Colo. 1992); Chicago District Council of Carpenters Pension Fund, et al., Sciortimo Contractors, Inc., 934 F. Supp 277 (N.D. Ill. 1996); Farrell v. Metropolitan Relocations, Inc., 1996 WL 19223 (E.D.N.Y. 1-11-96, No. CV-95-0557); Bennett v. Machine Metals Co., Inc., 591 F. Supp. 600, 604 (E.D. Pa 1984); Chicago District Council of Carpenters Pension Fund, et al., v. The Industrial Erectors, Inc., 840 F. Supp. 1248 (N.D. Ill. 1993); Roofers Local Union No. 81, et al., v. Wedge Roofing, Inc., 811 F. Supp 1398, 1401 (N.D. Cal. 1992); Board of Trustees v. Udovch, 771 F. Supp 1044, 1047 (N.D. Cal. 1991); Teamsters Local No. 429 Health and Welfare Fund v. Chain Bike Corp., 643 F. Supp 1337, 1343-44 (E.D. Pa. 1986); ITPE-MEBA / NMU Funds v. United International Investigative Services, 13 EBC 2538 (D.C. 1991) (mem. order).

The mere fact that other Courts disagree with a portion of the C.J. Rogers decision does not require reversal of the Court's decision. However, the unanimous disagreement of so many Courts would seem to indicate that this Court should consider the possibility that those Courts have correctly applied the legislative intent underlying the MPPAA.

From its inception, ERISA was designed to be a comprehensive statue that would protect the rights of persons participating in employee benefit plans.[1] However, after the

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[1] 29 U.S.C. § 1001(b) provides: "it is hereby declared to be the policy of this Act to protect the interests of participants in employee benefit plans and their beneficiaries by establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans, and by providing for appropriate

statute was implemented, it became clear that multi-employer funds were experiencing great difficulty in collecting accrued contributions. As a result, in 1980, Congress modified certain portions of ERISA with legislation identified as the Multi-Employer Pension Plan Amendments Act of 1980, Pub. L. 96-364. The MPPAA was intended to address the financial problems facing trustees because of delinquent contributions and unpaid withdrawal liability. Penn Central Corporation v. Western Conference of Teamsters Pension Trust Fund, 75 F. 3d 529, 531 (9th Cir. 1996).

The MPPAA was passed after consideration of detailed committee reports. The Senate Report provided, in part:

> "Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans. Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been . . . received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys fees and other legal costs arise in connection with collection efforts."
>
> "These costs detract from the ability of plans to formulate or meet funding standards and

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remedies, sanctions, and ready access to the Federal courts."

adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. . ."

"Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's, promise and the plans' entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law (other than 29 U.S.C. § 186). Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises."

"The public policy of this legislation to foster the preservation of the private multiemployer plan system necessitates that provision be made to discourage delinquencies and simplify delinquency collection. The bill imposes a Federal statutory duty to contribute on

> employers that are already obligated to make contributions to multiemployer plans. A plan sponsor that prevails in any action to collect delinquent contributions will be entitled to recover the delinquent contributions, court costs, attorney's fees, interest in connection with delinquencies. The intent of this section is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies."

STAFF OF SENATE COMM. ON LABOR AND HUMAN RESOURCES. 96TH CONG. 2D SESS. S. 1076, SUMMARY AND ANALYSIS OF CONSIDERATION 4344 (Comm Print 1980). (See also H.R. Rep. No. 869, 96th Cong., 2d Sess. 67, in 1980 U.S. Code Cong. & Ad. News 2918, 2935) The managers of this legislation in the House and Senate read into the Congressional Record portions of this report. (Cited and discussed in Central States v. Gerber Truck, 870 F. 2d. 1148, 1152-53 (7th Cir. 1989) *(en banc)*, and Central States, Southeast and Southwest Pension Fund v. Alco Express Co., 522 F. Supp 919 (E.D. Mich 1981).)

The purpose of the amendments was, in part, to allow plans to collect delinquent contributions as simply and inexpensively as possible. It is equally clear that Congress intended that plans should be allowed to collect all of their costs where they are successful. A plan which collects delinquent contributions after filing a complaint for such amounts has been successful.

Although the question which is presented here is purely legal, the facts further demonstrate why the requested relief is appropriate. Here, at the time the action was filed, Defendant had remitted forty-seven (47) payments in a delinquent manner. Defendant was three months behind when the action was filed. Defendant was served on August 3, 1998. Shortly before the first scheduled hearing, Defendant paid all outstanding contributions. Clearly, Plaintiffs' action triggered the timely payment of delinquent contributions.

With all due respect to this Court's decision in C.J. Rogers, it appears that the legislative history of ERISA supports the majority position. If the statutory purpose is to facilitate collections and eliminate the cost of collection to multi-employer plans, the plans must be allowed to collect § 1132(g)(2) damages from employers such as Defendant for plans to incur the cost of initiating and filing a lawsuit, and who pay contributions only after a collection action is filed.

CONCLUSION

For these reasons, Plaintiffs request this Court to grant rehearing *en banc* for the purpose of considering the question of whether an employee benefit plan is entitled to recover statutory liquidated damages under Section 502 of ERISA when fringe benefit contributions are due at the time an enforcement action is filed.

Respectfully submitted,

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Dated: April 5, 2000

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed June 1, 2000]

No. 99-1144

TRUSTEES FOR MICHIGAN CARPENTERS COUNCIL PENSION FUND; TRUSTEES FOR MICHIGAN CARPENTERS COUNCIL APPRENTICESHIP AND TRAINING FUND; TRUSTEES FOR MICHIGAN CARPENTERS COUNCIL HEALTH AND WELFARE FUND, *Plaintiffs-Appellants*,	)
v.	)
W.W.A., INC., *Defendant-Appellee.*	)

ORDER

BEFORE: WELLFORD, BATCHELDER, and DAUGHTREY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the

original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____

Leonard Green, Clerk